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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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NATIONAL BROADCASTING COMPANY, INC.,
*Petitioner,*

*v.*

FRANK HERMAN AND FRANK MULLANEY,
*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S SUPPLEMENTAL BRIEF

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Pursuant to Supreme Court Rule 22.6, Respondents, FRANK HERMAN and FRANK MULLANEY, submit their brief in opposition to Petitioner's supplemental brief which contends that this Court's decision in *Trans World Airlines, Inc. v. Thurston,* 53 U.S.L.W. 4024 (January 8, 1985) should beneficially affect Petitioner's Petition.

## REASONS FOR NOT GRANTING THE WRIT

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In our initial brief in opposition to the petition for certiorari we stated, *inter alia,* that the Seventh Circuit's decision, in this case of willful age discrimination, elaborately recited the potential facts already presented in support of and in opposition to summary judgment and merely held that based on Respondent's showing, they should not be denied a plenary trial to attack the veracity of Petitioner's proffered reasons for the refusals to hire, *i.e.,* to show that the reasons were pretextual.

There was no deviation from *Texas Department of Community Affairs v. Burdin,* 450 U.S. 248 (1981).

This Court's decision in *Trans World Airlines, Inc. v. Thurston,* 53 U.S.L.W. 4024 (January 8, 1985), presents nothing new or compelling to Petitioner's cause. *Thurston* stated that there was a willful violation of the Act "if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' " (at pg. 4028). The Court's intention was to define what constituted a willful violation for purposes of establishing liquidated damages. This Court did not believe that such damages should be awarded in virtually every case if the employer "simply knew of the potential applicability of the ADEA" (pg. 4028). However, this is not the posture of our case. We are at a preliminary stage of establishing a violation and not damages.

As noted, the Seventh Circuit recited extensive facts in support of its reversal of the summary judgment order. Contrary to Petitioner's argument in its supplemental brief, the Seventh Circuit did not base its findings on the sole finding that Petitioner posted notices of the Act. And contrary to Petitioner's supplemental brief argument, Respondent *did* offer proof to the courts below that NBC had violated the Act "knowingly" and/or "recklessly" in rejecting their applications for the positions they sought. The Seventh Circuit identified and relied upon two smoking guns of willful discrimination. One was when one of Petitioner's executives specifically requested that he be provided with the age of each applicant.[1] The second was when another executive of the Petitioner told an applicant for a job that he would not be hired because he was over 50 years of age.[2] The Seventh Circuit Court also identified and relied upon employment statistics which showed that no applicant over the age of 50 was hired while 33 applicants under the age of 50

[1] App. 9a. to Petitioner's Petition.

[2] App. 9a.

were hired.[3] These, *inter alia,* were what the Seventh Circuit considered as potentially proving that the Petitioner knew or showed a reckless disregard for whether its conduct violated the Act. Respondents are entitled to their day in court to prove these allegations.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied. Because of the frivolity of Petitioner's petition and its supplemental brief, Respondents request that they be awarded their attorneys' fees and costs.

Respectfully submitted,

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[3] App. 10a.